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Denise M. Sheehan
Commissioner

February 28, 2006

Department of the Interior
Minerals Management Service
ATTN: Amy C. White
Rules Processing Team (RPT)
381 Elden Street, MS-4024
Herndon, Virginia 20170-4817

Re: Minerals Management Service (MMS), Interior
RIN # 1010 – AD30
Advanced Notice of Proposed Rulemaking (ANPR)
Alternate Energy-Related Uses on the Outer Continental Shelf (OCS)

Dear Ms. White:

The New York State Department of Environmental Conservation (DEC) is pleased to provide comments in response to the Advanced Notice of Proposed Rulemaking (ANPR) for Alternate Energy-Related Uses on the Outer Continental Shelf (OCS) by the Mineral Management Service (MMS). DEC believes that development of regulations and procedures to provide leases for these activities should proceed in a methodical manner based on adequate resource assessment, environmental impact analysis, consultation with state and local governments, and coordination with state and local policy objectives. Specific recommendations related to the program areas and questions for discussion are provided below.

Program area: Access to OCS Lands and Resources

DEC believes that in identifying geographical areas of interest for resource and site assessment, and development feasibility, MMS should be pro-active in taking a "science-based" approach to determine suitable areas of the OCS for alternate energy development. MMS should target its regulatory program toward specific regions instead of a "one-size-fits-all" approach, as unique resources, environmental concerns, and regulatory regimes exist within various coastal regions.

Prior to any competitive process for awarding access rights for research and assessment by private companies, MMS should compile baseline data for OCS resources that include factors such as: 1) Environmental sensitivity of the geographic area, including proximity to designated protected areas, fish and shellfish resources, coastal barrier resources, and important avian breeding areas and migration routes, 2) Competing uses such as shipping and fishing, 3) Compatibility with existing uses and regulations in state jurisdictional waters, and 4) Public perception and acceptance of potential development in these areas. Every effort should be made to identify areas where there will be the least potential for impacts to marine resources and that avoid conflicts with commercial and recreational activities.

Lease-sale specific or site-specific studies should consider factors such as the availability of resources (e.g., wind energy potential), technical feasibility (e.g., depth to bottom, engineering constraints), and potential impacts to sensitive resources. This may require surveys of benthic and pelagic resources, as well as coordination with user groups, to locate areas of high resource value. Finfish, squid, surf clam and lobster resources are of particular concern. Use by marine mammals and sea turtles is another area of concern. Sediment type (sand, clay, silt, etc.) should be characterized. If the sediment is high in organics, it may be necessary to perform chemical analysis, especially if a potential site is located close to an active or former dump site. The above holds for both the offshore facilities and the transmission lines which may impact additional resources associated with shallow water habitat in the bays, such as hard clams and eelgrass beds, sensitive spawning and nursery areas, and sensitive habitats such as reefs and bars. Additionally, if the project is to involve any moving parts underwater (tide energy), there will need to be an assessment of the potential impact to finfish, including modeling, surveys and monitoring.

Throughout the process of developing the regulatory program to provide leases in the OCS, MMS should actively consult with state authorities to ensure that federal activities complement state and regional policy objectives. New York State has adopted policies in support of appropriately designed and developed alternative energy sources, including the Renewable Portfolio Standard and the Green Power Mandate for state agencies.

Program Area: Environmental Information, Management, and Compliance

DEC generally supports the concept of utilizing Environmental Management Systems (EMSs) as components of activities considered under this program. However, existing DEC policy encourages their use for facilities already in operation; not during project planning, permitting, or decommissioning. Studies funded by EPA and conducted by UNC Chapel Hill demonstrate operational benefits associated with EMS adoption (see http://ndems.cas.unc.edu/). However, the Federal Register notice describes the EMS as going beyond operational matters and includes addressing planning, development and removal of facilities. Further, the Federal Register notice states that the EMS will require identifying mitigation measures. Decisions in EMSs are primarily made within the facility that is implementing the system. Since facility planning, development and identification of mitigation measures are matters that weigh heavily on public discourse, an approach such as an EMS, which is focused on internal decision making, may not be an appropriate tool for these matters. In addition, other than utilizing EMSs for

operating facilities, there does not appear to be any track record in utilizing EMSs in other applications. Lastly, any efforts to alter the EMS to make it more appropriate for matters that require significant public discourse may in effect alter the EMS to the point that it impedes the ability of the system to act as it was originally intended; to be an internal tool for enhancing a facility's overall level of environmental performance.

The matter of how an EMS should be monitored needs to consider what the state or federal agency is looking for the EMS to achieve. In situations where the EMS is strictly voluntary in nature, and serves only to augment an existing regulatory compliance regime, the facility operator can determine the level of monitoring that they believe is adequate to verify that system objectives are being met. Even in these cases, it would be desirable for facilities to couple their self-monitoring with some level of independent review. However, if the EMS is adopted for purposes of obtaining a financial incentive, regulatory flexibility, or diminished regulatory scrutiny, or will otherwise be used to achieve public policy goals, independent monitoring and government verification is crucial. Independent monitoring, either through third-party or governmental review, provides the public and government agencies with verifiable information about the facility's performance in complying with established EMS standards, regulatory requirements, and activities that go beyond these requirements.

Adaptive management programs should be coordinated with state agencies, including DEC, prior to their implementation. Monitoring should result in ongoing identification of mitigation actions. MMS should be given clear authority to require adequate monitoring and enforcement of regulatory compliance requirements and mitigation actions identified as part of the initial environmental review process, including the ability to intervene when a lessee is determined to be non-compliant with one or more of these established parameters. How MMS will interact with state regulatory authorities to execute enforcement actions should be clearly established, particularly if states are expected to assume any responsibility for enforcement.

Program Area: Operational Activities

During construction of facilities anticipated under this program, activities that adversely impact or conflict with the marine environment, existing uses, and established public policies, need to be avoided or minimized. It is likely that, for some or all of the construction, environmental windows will be necessary, especially in the near-shore and back bay areas. Transmission lines should be located to avoid areas of high resource value. Transmission lines must be buried deeply enough that they do not cause disruption of commercial activities, particularly surf clam dredging. The natural grade should be restored after installation of cables or pipelines. Controls will need to be in place to avoid the release of oils, debris or other contaminants during construction. The impacts of changes in habitat type and the magnitude of the changes need to be considered, not only for the footprint of the facility, but for any erosion control or wave attenuation structures necessary.

Design and installation of new projects, or modification of existing facilities, should include consideration of controls on the discharge of contaminants, including those from ships supplying or servicing the facility. If the facility uses moving parts underwater, such as for tide

driven turbines, there may be a need for continual monitoring of resource impacts in addition to the initial modeling, surveys and monitoring. Consideration should be given to conducting studies to evaluate colonization of the structures and use by marine resources and anglers. There also needs to be a discussion whether any of these facilities will require a closed safety zone. If so, there will be a larger impact on user groups.

In anticipation of the "end-of-life" of a facility, financial assurance should be required to cover costs of de-commissioning. MMS should develop guidelines in cooperation with the state regarding acceptable practices for decommissioning. Management considerations for end-of-life and facility removal include release of contaminants during demolition, the life expectancy and long-term stability (physical and chemical) of the materials, whether the structures have become valuable habitat that should be preserved (at least at depths that do not preclude navigation) and whether the transmission lines should remain in place or be removed. In lower energy areas where the cable or pipelines are sufficiently buried, they should remain in place to avoid habitat disturbance, but in some near-shore areas where waves or currents may expose the transmission lines, removal to avoid conflicts with fishing activities or anchoring should be considered.

NYS DEC looks forward to a continued dialog with MMS as specific guidelines and policies are developed under this program.

Sincerely,

/s/

Jack A. Nasca, Chief
Energy Projects & Management
Division of Environmental Permits

cc: Lynette Stark, Executive Deputy Commissioner
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